Garden State CLE presents:

Bias from the Bench

Instructor:

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Lesson Plan

I. Introduction

It is difficult to image any misconduct by a judge that can have a more corrosive effect on the public's confidence in the judiciary than an open display of bias or prejudice. As might be expected, purposeful misconduct of this type is exceedingly rare. In most instances, when an allegation of open prejudice or bias has been preferred against a sitting judge, the misconduct has resulted not in disciplinary proceedings, but rather in a removal of the case from the offending judge and the granting of a new trial.

An open display of hostility by a sitting judge based upon race, religion, national original and the like makes for easy cases. Such misconduct is prejudicial to the administration of justice and tends to bring the judiciary into disrepute.[1] But beyond open hostility, there is a wide range of comments that a judge may make from the bench which, although not intended as such, may be perceived by the public or one of the parties to the controversy before the court as demonstrating bias or prejudice. The potential for grave damage to the judiciary exists in these types of instances as well, although for a different reason. It has long been the policy of our State that judges must feel free to speak their minds and decide factual and legal issues in an atmosphere that is utterly devoid of fear or threat of retaliatory discipline or criminal prosecution.[2] The freedom to speak frankly applies even if what a particular judge says turns out to be wrong as a matter of fact or law. The system of justice in New Jersey, replete with the availability of numerous channels for review and appeal, is intended to correct the mistakes that judges make from the bench. But if judges were to become fearful that their comments might subject them to retaliatory discipline on the basis of unfounded allegations of bias or prejudice, the damage to the administration of justice would be immeasurable.

This is the danger that judicial disciplinary authorities face in reviewing bias and prejudice cases. Some matters involve conduct that is so outrageous that there is no serious issue related for the need for discipline from the Supreme Court. However, in other instances, the purported ethical violation is not so clear. The central question is at what point does legitimate comment on issues before the court cross the line from honest opinion (right or wrong as a matter of fact or law) to a demonstration of bias or prejudice? Unfortunately, as will be seen below, the case law does not provide much helpful guidance on this difficult question.

II. Canons of Judicial Conduct

CANON 3 - A judge shall perform the duties of judicial office impartially and diligently.

RULE 3.6 Bias and Prejudice

(A) A judge shall be impartial and shall not discriminate because of race, creed, color, sex, gender identity or expression, religion/religious practices or observances, national origin/nationality, ancestry, language, ethnicity, disability or perceived disability, atypical hereditary cellular or blood trait, genetic information, status as a veteran or disabled veteran of, or liability for service in, the Armed Forces of the United States, age, affectional or sexual orientation, marital status, civil union status, domestic partnership status, socioeconomic status or political affiliation.

(B) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice on the bases specified in Rule 3.6(A), against parties, witnesses, counsel or others. This section does not preclude legitimate advocacy when the listed bases are issues in or relevant to the proceeding.

(C) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice or harassment on the bases specified in Rule 3.6(A), and shall not permit court staff, court officials or others subject to the judge's direction and control to do so. This section does not preclude reference to the listed bases when they are issues in or relevant to the proceeding.

COMMENTS:

[1] The prohibited bases in this rule are primarily drawn from the Law against Discrimination, N.J.S.A. 10:5-1, et seq.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes, threatening, intimidating, or hostile acts, suggestions of connections between race, ethnicity, or nationality and crime and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on prohibited bases listed in Rule 3.6(A).

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that is unwelcome.

III. Disqualification for Bias

Generally speaking, any party to an action may move before a court for a judge's disqualification prior to the commencement of trial or argument. The basis for a motion to seek the removal of a judge from a case must conform to the reasons set forth under Rule 1:12-1. If the reason for removal or disqualification is based upon an allegation of bias or prejudice, a motion should be brought under Rule 1:12-1(g). Such a motion may be based upon an allegation of either actual bias or conduct by the judge that gives the appearance of bias. This paragraph of the Rule provides that disqualification is mandatory, "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." In State v. Marshall, 148 NJ 89, 279 (1997), the New Jersey Supreme Court construed this rule as follows:

> We acknowledge that it is not necessary to prove actual prejudice on the part of the court, and that the mere appearance of bias may require disqualification. However, before the court may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable.

Thus, a pretrial motion to disqualify a judge on the basis of bias or prejudice must be supported by objectively reasonable evidence that the judge has engaged in conduct that raises the appearance of bias. Such evidence will circumstantial and come in the form of inferences that can be found in the record of the case or from past comments by the judge. On the other hand, conduct that demonstrates actual bias need not be supported by objectively reasonable evidence. Direct evidence in the form of comments in the record from the judge will usually be sufficient to prove this type of allegation.

IV. Judiciary discipline based upon bias

a.) Sentencing

In re Gaeta

The Gaeta presentment presents a close case, one that raises the conflicting issues of judicial independence to speak without fear of retaliatory disciplinary action against the necessity of judges to avoid even the appearance of bias or prejudice. In Gaeta, a Superior Court judge was called upon to impose sentence on an adult female teacher who had engaged in unlawful sexual relations with one of her male students. The student was 13 years old at the time of the sexual assault. Although a 13-year old child does not have the legal capacity to consent to such sexual activity, the sexual relations between the student and the teacher apparently continued for a period of time and were mutually voluntary. The plea agreement in the case called for the imposition of a custodial term. However, the judge declined to impose a jail term and based his decision on what were arguably stereotypical views regarding the sexual nature of young boys.

The members of the Advisory Committee on Judicial Conduct noted that judges make mistakes. “Judicial errors, if honestly made, are open to correction and, therefore, tolerated in the administration of justice.” However, the remarks of this judge went beyond an honest mistake or legal error. The remarks implied a bias about the sexuality of minors that could impugn the impartiality and open-mindedness necessary to make sound determinations of law. Such misconduct violates both Canon 2A of the Code of Judicial Conduct and Rule 2:15-8(a)(6) in that it tends to bring the administration of justice into disrepute.

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b.) Motion practice

In re Silva

In her role as a Superior Court judge assigned to the Family Court, Judge Silva was called upon to decide a novel legal issue related to juvenile waiver of the Court's jurisdiction in a sexual assault case. At issue in the case was an interpretation of new statutory language that predicated waiver of the juvenile in these types of cases upon proof that the sexual assault was especially heinous or cruel." The judge issued a comprehensive opinion under seal denying the State's waiver application. The key factor in the judge's decision was that the facts establishing the underlying crime did not meet the requirements of being especially heinous or cruel. The judge's ruling was appealed to the Appellate Division. The appellate panel's unpublished decision was not made under seal and became the subject of widespread controversy in media reports.

The purported disciplinary issues related to the words used by Judge Silva in her written opinion which did not reflect sufficient consideration for the nature of the crime or its impact on the victim. Essentially, Judge Silva was accused of, "Sacrificing sensitive and conciliatory language in favor of a more clinical, unemotional, perhaps even stoic legal evaluation of the statutory factors and the prosecutor's burden.

Although a majority of the ACJC found the judge's words to be inappropriate, it determined not to initiate disciplinary proceedings against her based uon a lack of probable cause to believe she had violated the *New Jersey Code of Judicial Conduct*. This decision was based largely upon the policy need to allow judges to render decisions freely and in good faith without fear of retribution from disciplinary authorities in all but the most extreme cases.

https://www.njcourts.gov/attorneys/assets/acjc/MarciaSilviaMajorityStatement.pdf?c=LW0

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c.) Prejudging cases and controversies

In re Rivas, 241 NJ 491 (2020) (censure)

January 10, 2019 Respondent presided over an OTSC hearing in the matter of J. V. v. M. R. during which he gave vent to his personal disdain for the plaintiff's decision to file the OTSC, which he viewed as having been done in bad faith, verbally chastised both litigants, as well as another individual present in the courtroom, and demonstrated a lack of self-control that is inimical to a jurist's role as a neutral and dispassionate arbiter.

In Respondent's view, the plaintiff had fraudulently filed the OTSC to humiliate and harass the defendant. As such, throughout the more than 30-minute OTSC hearing, Respondent made several inappropriate and injudicious comments to the parties.

By way of example, Respondent warned the parties and to avoid any future misconduct, stating,

> If you three have not figured out that I'm here just dying to whack one of you, just dying to whack one of you, come back. Come back. Your mistake was coming into my courtroom.

Speaking to the parties, Respondent continued with the following comment:

> Your problem is with that knucklehead. But, it is clear that you folks have been involved in a triangle, and kind of like the Bermuda Triangle, it's deadly. And you two ladies have let yourselves get played by this guy. I'm not going to call man, because he does deserve that title '*homo sapiens*.' Well, him a not. The only person you should be sending naked pictures to is Hugh Hefner. He will pay you $100,000 for the use of them."

Link:

https://www.njcourts.gov/attorneys/assets/acjc/RivasPresentment.pdf?c=9IS

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d.) Insensitivity to victims

In re Russo, 242 NJ 179 (2020) (Removal)

Count I involved Respondent's conduct during and after a hearing for a final restraining order. The plaintiff, an unrepresented litigant, alleged that the defendant threatened her life, sexually assaulted her, and made inappropriate comments to their five-year-old daughter. On the first day of the hearing, the plaintiff testified that defendant "force[d] himself on [her] to have sex with him." She described that alleged attack as well as other events of alleged domestic violence. During cross-examination, defense counsel at one point asked the plaintiff if she had ever worked as an exotic dancer, which she admitted. Soon after, Respondent took over the questioning and asked the plaintiff at length about her efforts to stop the alleged assault, including whether she had tried to "[b]lock [her] body parts," "[c]lose [her] legs," "[c]all the police," or "leave."

No witness, alleged victim, or litigant should be treated that way in a court of law. As the ACJC found, the questions were "wholly unwarranted, discourteous and inappropriate." The questions also shamed the alleged victim by intolerably suggesting she was to blame. Respondent claimed he was trying to help a "demoralized" witness on cross-examination and "get her re-engaged in the hearing." That explanation does not square with the record. Beyond that, Respondent's coarse questions about how the plaintiff responded during the alleged assault were not relevant. Sexual assault turns on the alleged aggressor's use of physical force, not the victim's state of mind or resistance.

Respondent's comments to his court staff and law clerk after the hearing ended are just as problematic. He asked if they had "hear[d] the sex stuff" and said, "You think it is all fun and games out here." Respondent also said, "I am the master of on the record being able to talk about sex acts with a straight face."

Judges set the tone for a courtroom. Especially when it comes to sensitive matters like domestic violence and sexual assault, that tone must be dignified, solemn, and respectful, not demeaning or sophomoric. Respondent failed in that regard.

e.) National origin

In re Citta, 201 NJ 413 (2010) (Reprimand)

I. FINDINGS

A. Factual and Procedural Background

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1977. At all times relevant to this matter, Respondent served as a Superior Court Judge in the Ocean Vicinage Criminal Part, a position he continues to hold.

On April 13, 2006, Respondent presided over a sentencing hearing in the matter of State v. Alex Ramirez, Indictment No. 04-06-1127, relating to the Defendant's parole violation. After accepting the Defendant's guilty plea, Respondent heard from the Defendant's attorney regarding the reasons Defendant violated the terms of his parole, which included the Defendant's alleged inability to speak and understand English and his parole officer's inability to speak and understand Spanish. Respondent reacted as follows:

> THE COURT: Now, so let me understand this. Not only do we have to let him come into the country illegally and stay here, not only do we have to provide him with public assistance, not only do we have to provide him with free health care, not only do we have to provide him with a free attorney when he gets in trouble, now he wants a bilingual probation officer, because otherwise it's inconvenient for him. Is that my understanding of what you're saying?

P-1 at T5-13 to 20.

When the Defendant's counsel attempted to clarify his position regarding the Defendant's "inability to understand English," Respondent stated:

> THE COURT: But he's been here for five years.
>
> MR. VITO: Six years, your Honor, yes.
>
> THE COURT: Six years.
>
> MR. VITO: Yes.
>
> THE COURT: But who's counting?
>
> MR. VITO: Who's counting?
>
> THE COURT: And so in six years, he hasn't learned enough English to report to the probation department?

Id. at T6-3 to 12.

Later in the proceeding, Respondent afforded the prosecutor an opportunity to speak, at which time he sarcastically advised her that she could speak in Spanish if she wished as the court had the benefit of a bilingual prosecutor, bilingual probation officer and interpreter. Id. at T7-9 to 14. Respondent subsequently made the following remarks to the Defendant:

> THE COURT: Well, I think it's a miracle you haven't been sent back to Mexico as a result of being placed on probation and being charged with these crimes in the first place.
>
> . . .
>
> If it was up to me, I'd take you just as you're dressed and bound right now and have you escorted back to Mexico forthwith and

Link: https://www.njcourts.gov/attorneys/assets/acjc/CittaPresentment.pdf?c=tLa

In re Convery, 201 NJ 411 (2010) (Reprimand)

Video link: https://www.youtube.com/watch?v=KZqLTXFUiYs

The Advisory Committee on Judicial Conduct having filed with the Court pursuant to *Rule* 2:15-15(a), a presentment recommending that **JAMES B. CONVERY,** a Judge of the Superior Court, be publicly reprimanded for violating *Canon* 1 (a judge should maintain high standards of conduct so that the integrity and independence of the judiciary may be preserved), *Canon* 2A (a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), *Canon* 3A(2) (a judge should maintain order and decorum in judicial proceedings), *Canon* 3A(3)(a judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity), *Canon* 3A(4)(a judge should be impartial and should not discriminate because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or disability), and *Rule* 2:15-8(a)(4)(intemperate conduct) and (6)(conduct prejudicial to the administration of justice that brings the judicial office into disrepute);

And respondent, through counsel, having accepted the findings and recommendation for discipline of the Advisory Committee on Judicial Conduct and having waived his right to the issuance of an Order to Show Cause and a hearing before the Supreme Court;
And good cause appearing;

It is ORDERED that the findings and recommendation of the Advisory Committee on Judicial Conduct be adopted and **JAMES B. CONVERY,** a Judge of the Superior Court, be hereby publicly reprimanded.

State v. Perez, 356 NJ Super.527 (App. Div. 2003) (New trial)

On August 23, 2000, the case was called for trial in the municipal court, and the following remarks were made:

[DEFENSE COUNSEL]: My client says he wants an interpreter.
THE COURT: For what language?
MR. PEREZ: Spanish.
THE COURT: How do you know what I just said?
(No audible response.)
THE COURT: You speak English.
[DEFENSE COUNSEL]: He-he understands English. It's not his first language.
THE COURT: When are we going to stop this.
[DEFENSE COUNSEL]: I'm just telling you-
THE COURT: Can I go into court and say, I want a Celtic interpreter?
**599 [DEFENSE COUNSEL]: I'm just telling you what he told me, Judge.
THE COURT: Hey, I'm Irish. I want somebody who speaks Irish. That's it. The fact that I speak English, too, too bad. I want somebody who speaks Irish.
These Spanish people coming in here and saying, I want an interpreter.
Well, you speak English.
So what? I want an interpreter. Somewhere, this has got to stop. So, somebody racks up $200.00 an hour for interpreting and the guy speaks perfect English, proved by the fact that he understood exactly what you and I just said.
Why don't you speak English, sir?
(No audible response.)
THE COURT: Why do you want an interpreter?
(No audible response.)
THE COURT: You did learn in a hurry, didn't you?
(Laughter)
THE COURT: You've got to give them credit. They just-he picked up on that quick.
Well, I guess I better do it. I'd have the ACLU and the people marching outside with signs and so forth.
[DEFENSE COUNSEL]: I know you have an interpreter coming tonight.
THE COURT: Won't-won't help.
All right. We'll have an interpreter here.
[DEFENSE COUNSEL]: Okay. You can just wait back there.
COURT OFFICER: He has the $200.00?
[DEFENSE COUNSEL]: He's-he's waiting for the $200.00.
(The Court attends to other business.)
*531 THE COURT: All right, counselor. The case is adjourned.
[DEFENSE COUNSEL]: Thank you, Judge.
THE COURT: We'll have to get an interpreter. Okay.

COURT OFFICER: Which case is this, Judge?
THE COURT: This is-uh-Perez.
[DEFENSE COUNSEL]: Perez.
[PROSECUTOR]: Perez.
THE COURT: Perez-Gerardo-Gerardo Perez.
[DEFENSE COUNSEL]: Thank you, Judge.

Thereafter, defendant moved in writing for the judge to recuse himself for showing bias against defendant. At the beginning of the trial, which occurred on December 27, 2000, defendant's counsel noted that the judge had denied the motion, apparently by a written order. No reasons were placed on the record for the denial. At the conclusion of the municipal court trial, this exchange occurred during sentencing:

MR. PEREZ (through Interpreter): I pay you $500.00 today and then what? And then 15 days later I have to pay you $150.00?
THE COURT: I'm going to punch this guy out before I get out of here.

In ordering a new trial, the Appellate Division held that the judge's comments bespoke of a bias toward people of Hispanic origin. His comments lumped the defendant together with an identifiable minority against whom the judge expressed a degree of anger and further indicated his belief that the defendant was an incredible person based upon the conduct of the ethnic group to which he belonged. Such conduct by a judge violates Article I, paragraph 5 of the New Jersey Constitution which provides that

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

In short, “group libel, which includes defamation of a class of persons based on those constitutional categories, mars civil discourse, and certainly is reprehensible in the halls of justice.”

See also State v. Roberts, 47 NJ 286 (1966) (New trial based upon purported racial epithet by the judge)

V. Appendix - Other examples of bias from the bench

a.) Sexual harassment

In re Seaman, 133 NJ 67 (1993) (sixty-day suspension from office) (Law clerk)

In re Subryan, 187 NJ 139 (2006) (sixty-day suspension from office) (Law clerk)

In re Council, 22 NJ 395 (2015) (thirty-day suspension from office) (Improper touching of employee)
https://www.njcourts.gov/attorneys/assets/acjc/CouncilPresentmenta.pdf?c=TT7

b.) Abuse of litigants and court staff

In re Rzemieniewski, 185 NJ 598 (2005) (Censure) (Litigants)
https://www.njcourts.gov/attorneys/assets/acjc/RzemieniewskiPresentment.pdf?c=cyj

In re Portelli, 225 NJ 1 (2016) (Reprimand) (Vulgar & insensitive remarks about and to counsel)
https://www.njcourts.gov/attorneys/assets/acjc/PortelliPresentment.pdf?c=5l3

In re Giles 196 NJ 456 (2008) (Reprimand) (Vulgar, discourteous & disrespectful comments)
https://www.njcourts.gov/attorneys/assets/acjc/GilesPresentment.pdf?c=HXN

In re McElroy, 196 NJ 457 (2008) (Censure & permanent bar from judicial office) (Court employee a target of disrespectful & insulting remarks)
https://www.njcourts.gov/attorneys/assets/acjc/McElroyPresentment.pdf?c=pdM

In re Baker, 206 NJ 580 (2011) (Reprimand) (Yelling at and disparaging a litigant)
https://www.njcourts.gov/attorneys/assets/acjc/BakerPresentment.pdf?c=dDv

In re Portelli, 225 NJ 1 (2016) (Reprimand)

Respondent made a number of vulgar, insensitive and insulting remarks to attorneys that appeared before him regarding the deficiencies of an adversary attorney.

Presentment link:

https://www.njcourts.gov/attorneys/assets/acjc/PortelliPresentment.pdf?c=5l3